EFiled: Dec 22 2016 09:28PM EST
Filing ID 59989974
Case Number 482,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, on behalf of itself and on behalf of all others similarly situated, Plaintiff-Below, Appellant, v. JERRY M. COMSTOCK, JR., as Independent Executor of the Estate of Joshua E. Comstock, RANDALL C. MCMULLEN, DARREN M. FRIEDMAN, ADRIANNA MA, MICHAEL ROEMER, C. JAMES STEWART, III, H.H. "TRIPP" WOMMACK, III, THEODORE "TED" MOORE, NABORS INDUSTRIES LTD., and MORGAN STANLEY & CO. LLC, Defendants-Below, Appellees.	No. 482, 2016 Appeal from the Memorandum Opinion dated August 24, 2016 of the Court of Chancery of the State of Delaware, C.A. No. 9980-CB

APPELLANT'S REPLY BRIEF

Mark Lebovitch
Jeroen van Kwawegen
Christopher J. Orrico
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
Tel: 212.554.1400

Stuart M. Grant (Del. #2526)
Mary S. Thomas (Del. #5072)
GRANT & EISENHOFER P.A.
123 Justison Street
Wilmington, DE 19801
Tel: 302.622.7000

Counsel for Plaintiff Below-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

C&J stockholders deserve the chance to seek compensation from the fiduciaries who manipulated the C&J sales process and withheld material information. Having been deceived about the Nabors Deal and the Cerberus Bid, C&J investors lost all of their equity in the recent C&J bankruptcy (obtaining only warrants allowing them to *purchase* new common stock in the reorganized entity), while C&J's old management handed the Company to creditors in exchange for retaining their control.[1] If ever accountability was needed, this is the case.

Unable to justify the legal errors resulting in the Opinion, Defendants essentially advocate for new standards of review and burdens of proof. This Court should reject Defendants' effort to rewrite the rules and hold, under well-settled legal principles, the trial court erred and Plaintiff's detailed Complaint meets applicable standards.

Defendants repeatedly argue the Court should reject Plaintiff's factual allegations. (C&J Br. 9-22.) But this is improper on a motion to dismiss. Defendants' self-serving spin on the evidence is just that: spin. To the extent there are two ways to interpret factual allegations, the trial court should have,

[1] Compendium Tab 1, Ex. A "Plan" at 20-22, art. III.B.4 & 9.

but did not, draw all reasonable inferences in Plaintiff's favor. To the extent Defendants accuse Plaintiff of misrepresentations, let there be no doubt, ***Plaintiff and its counsel stand by every one of their allegations***, and believe an impartial factfinder would reach the same conclusions following full discovery.

Defendants also ask this Court to rewrite longstanding Delaware precedent to undermine the duty of loyalty. They attempt to distinguish leading cases by artificially narrowing their application to the precise fact patterns of the prior decisions, ignoring principles those cases establish. (C&J Br. 12-13.) Delaware law prohibits the conduct alleged in the Complaint. As alleged, Comstock misled his Board, schemed with Nabors to falsify financials to support a flawed deal, shut down and bullied advisors who put "his" deal at risk, and buried material facts about a viable alternative offer. (Op. Br. 8-17.)

If Delaware does not regulate the serious misconduct alleged, the duty of loyalty is meaningless. Indeed, if the disclosures made here trigger an "irrebuttable" business-judgment rule, then Delaware will be inviting faithless misconduct. Defendants seeking protection under *Corwin* must bear their burden for such powerful protection. The Opinion should be reversed.

ARGUMENT

I. THE TRIAL COURT MADE IMPROPER FACTUAL FINDINGS AND DREW INAPPROPRIATE INFERENCES

The trial court's contested factual findings and inferences favoring Defendants warrant reversal. (Op. Br. 18-25.) Rather than defend these errors, Defendants ask this Court to make additional adverse inferences, and baldly attack Plaintiff's allegations as false. (C&J Br. 9-22.) Defendants' vitriol is misplaced, as the Complaint's specific allegations must be credited and the Court must draw reasonable inferences in Plaintiff's favor. *Sandys v. Pincus*, 2016 Del. LEXIS 627, at *8 (Del. Dec. 5, 2016) ("[W]e are bound to draw all reasonable inferences from [the Complaint's] facts in the plaintiff's favor.").

Defendants improperly (i) insist this Court take their word about disputed facts; (ii) parse Plaintiff's allegations, eschewing a holistic review; and (iii) seek to have all inferences and contested factual matters drawn in their favor. This turns accepted standards on their head. The Opinion should be reversed.

A. COMSTOCK WAS CONFLICTED

The trial court misinterpreted the Complaint to rule Comstock was conflict-free. (Op. Br. 18-25.) Defendants' opposition asks this Court to compound that error.

First, C&J argues "Comstock did not need the Transaction to secure a new employment deal." (C&J Br. 13-14.) That is not Plaintiff's theory. The Complaint alleges Comstock was self-interested in the deal because the employment agreement included "$19.1 million in bonuses and extensive protections ensuring his employment as Chairman and [CEO] of New C&J for at least five years" and severance payments that "balloon from ***$173 million*** for an ordinary severance to ***$220 million*** for an unapproved change in control severance." (A133, ¶7; A135, ¶10(f); A167-A168, ¶98.) Defendants ignore this Court's own observation that the Nabors Deal improved Comstock's compensation, as his C&J package was "less generous" and "more modest" than what he extracted from Nabors. *C&J Energy Srvs., Inc. v. City of Miami Gen. Empls. Ret. Trust*, 107 A.3d 1049, 1064 (Del. 2014). There is no basis to surmise that C&J's Board would have given Comstock the same benefits absent a merger.

Second, Defendants ask this Court to conclude Comstock's employment agreement was immaterial. (C&J Br. 14.) But the Complaint specifies Comstock's new deal was so material that he refused to "sign for th[e] transaction without guaranteed terms for [himself] and management team." (A168, ¶99.) Nabors credited this threat enough to execute a side-letter granting Comstock's demands. (A168, ¶100.) This supports a reasonable inference of materiality.

Third, Defendants assert "the Complaint does not allege that Comstock's 'objective was empire-building.'" (C&J Br. 15.) Untrue. The Complaint alleges Comstock pursued the Nabors Deal to fulfill his agenda of growing "***his***" company and expanding "***his***" power through strategic acquisitions, "provided that he would personally run the combined company." (A133-A148, ¶¶4, 19, 42, 44, 47, & 124.) Comstock's post-injunction actions demonstrate he was materially self-interested to empire-build and to receive a greater compensation package. Specifically the Complaint alleges "the bankers hired to solicit the best deal for C&J's stockholders viewed it based on the empire-building benefits it would provide to management." (A140, ¶19.) Defendants and the trial court also ignore allegations that Comstock issued an unauthorized press release supporting the deal, tainted the

Solicitation Process, and enticed Morgan Stanley to support the "large company that [he] … put together." (A179, ¶124.) Such revisionist parsing fails. *Delaware County Employees Ret. Fund v. Sanchez*, 124 A.3d 1017, 1021 (Del. 2015) (Courts cannot "parse" allegations "categorically" and address each "on its own," courts assess allegations "in full context.").

Defendants also attempt to narrow longstanding Delaware precedent to eliminate Comstock's duty of loyalty. (C&J Br. 11-13.) But fiduciaries are not afforded business-judgment protection when they have the "temptation … to tip the scales in favor of a transaction" (Op. Br. 49); *see also Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1178 (Del. Ch. 1999) ("[I]f the Court finds facts evidencing disloyalty by the defendant, the business judgment rule is rebutted, and the Court reviews the transaction to determine whether … the transaction is nevertheless entirely fair to the Company's shareholders."). Viewed holistically, the Complaint alleges Comstock had motive to taint the process to protect his new contract and empire-building.[5]

[5] C&J contends the "notion that a fiduciary breaches his duties by seeking to grow the company turns Delaware law on its head." (C&J Br. 15.) Growing a company, in the abstract, is no breach. The Complaint alleges, however, in attempting to grow C&J, Comstock traded public stockholders' equity in the Company to assure ***his*** expanding empire.

B. COMSTOCK SKEWED THE SALES PROCESS

The Opinion made inappropriate factual findings and inferences in Defendants' favor concerning Comstock's manipulation of the sales process. (Op. Br. 23-25.) Defendants again ask the Court to approve and expand on those errors.

First, Defendants ask this Court to infer Comstock did not skew the process because the "Board was undisputedly aware of the deal terms and the fact that C&J's officers would receive new employment agreements." (C&J Br. 17.) The Board's knowledge of the deal terms does not undermine that Comstock tainted the Board's deliberating process by, for example, manipulating the information provided to them. (A147-167, ¶¶45-96.)[6]

Second, Defendants argue the $445 million EBITDA estimate for NCPS was not an "upside case," because "this Court has already recognized -- that McMullen's email did not contain the 'upside case' sentence." (C&J Br. 17.) This Court hardly rejected the $445 million EBITDA being an "upside

[6] Defendants' reliance on *Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.*, 2014 WL 1813340, at *17 (Del. Ch.), is misplaced. That court found the board could exercise its independent judgment where, unlike here, there was no allegation that the fiduciary withheld any material information. *See Mills Acquisition Co. v. Macmillan, Inc.*, 559 A2d 1261, 1281 (Del. 1989).

case." (Op. Br. 24 n.7.) Nor did this Court's reference to disputed affidavits outside of the Complaint on the injunction appeal permit the trial court to do the same in a dismissal motion. *Id.* The Complaint's specific allegation that the EBITDA estimate was an "upside case" deserves credence.

Third, Defendants repeat the trial court's conclusion that "Comstock's offer to pay a higher multiple to make up for a lower EBITDA represents a negotiating concession on C&J's part." (C&J Br. 17.) But it is equally plausible that Comstock reverse engineered a higher valuation to preserve his favored deal, without regard to stockholder interests. (A162-A164, ¶¶86-91.) That Comstock withheld his conscious "stretching" of the multiple from the Board also conflicts with the trial court's acceptance of this "innocent explanation." (A159-A160, ¶¶77-78, A166, ¶95.)

Fourth, Defendants contend the trial court properly ignored allegations that Comstock halted Deloitte's due diligence when Deloitte identified NCPS's "creative accounting," purportedly because it is "indisputable that Comstock told Deloitte to stop diligence because he was threatening to abandon the Transaction." (C&J Br. 18.) Defendants' position is hardly "indisputable," as the Complaint alleges Deloitte was shut down because it was raising red flags about Nabors' financials. Plaintiff specifically alleged

facts supporting the inference that Deloitte was shut down improperly. (A160-A166, ¶¶79-82 & 95.) Those allegations cannot be ignored, especially in light of the allegation that Deloitte's concerns were never shared with the Board. (*Id.*)

Fifth, Defendants ask this Court to accept the trial court's improper inferences concerning Morgan Stanley's interactions with Comstock,[7] asserting Morgan Stanley merely accepted an expedited assignment and Comstock was concerned with providing confidential information to competitors. (C&J Br. 19 (citing Op. 39-40).)[8] The trial court was required to credit that: (i) Bishop acted on Comstock's enticement of obtaining future business with the post-Nabors Deal "New C&J" and (ii) Comstock withheld updated forecasts to prevent the Committee from accurately comparing the

[7] C&J's assertion that manipulation of the Solicitation Process cannot trigger entire fairness on the Nabors Deal ignores that, absent this manipulation, an independent board would not ignore the Cerberus Bid in favor of the Nabors Deal. *Mills*, 559 A. 2d at 1279.

[8] C&J's reliance on *Alliance Gaming Corp. v. Bally Gaming Int'l, Inc.*, 1995 WL 523543, at *1-13 (Del. Ch. Aug. 11, 1995) is misplaced. *Alliance Gaming* holds that no authority "imposes upon a board…an affirmative duty to give a *hostile bidder access* to … confidential information, *in the midst of an ongoing contest for control*." *Id.* at *2 (emphasis added). Cerberus signed an NDA and standstill, supporting the inference that Comstock opportunistically withheld confidential information.

Nabors Deal with competing bids. (A172-A180, ¶¶110-125.) Plaintiff's theory is also supported by allegations that: (i) Bishop assured Comstock that Morgan Stanley was "100% supportive of [Comstock]" through the Solicitation Process and (ii) the Committee did not know of Comstock's offer to Bishop of future business with New C&J. (A174, ¶115; A179-A180, ¶125.)

C&J's contention that Plaintiff's claims are mere "quibbles" (C&J Br. 20) is similarly belied by the Complaint's detailed allegations that Morgan Stanley elevated Comstock's obsession with closing the Nabors Deal above C&J's public investors' interest, skewing the Cerberus Bid analysis. (A172-A180, ¶¶110-125.) These are not mere quibbles. Moreover, C&J's assertion that "there is no allegation that Morgan Stanley or the Committee were deceived" (C&J Br. 20) ignores Defendant Friedman's testimony that he was unaware of Comstock's promises and that Morgan Stanley "did not receive confidential forecasts." (A174, ¶115; A177, ¶122.)

The Complaint – reviewed under the proper pleading standards – particularizes how Comstock skewed the process to preserve the Nabors Deal.

C. THE BOARD ABDICATED THE PROCESS TO COMSTOCK

C&J argues the Complaint does not allege any failure by the Board to provide "active and direct oversight" of Comstock. (C&J Br. 20-22.) It does. (A132-A167, ¶¶3, 10, 56-64 & 92-96.) But even if the Board did not abdicate its duty (and it did), Comstock remains liable for his disloyal conduct. *See, e.g.*, *In re Dole Food Co. S'holder Litig.,* 2015 WL 5052214, at *29 (Del. Ch. Aug. 27, 2015) ("[E]ven the most motivated, skilled, and well-advised special committee cannot achieve a fair result if those in control of the corporation deliberately undermine it efforts."). The Complaint alleges Comstock corrupted the original process without adequate oversight by, *inter alia*, (i) not disclosing his unauthorized $2.925 billion offer after eliciting an "aggressive" compensation package (A154-A157, ¶¶65-71) and (ii) knowingly skewing NCPS's valuation upward (A159-A164, ¶¶77-91).

Comstock also prevented the Committee from adequately considering a potentially superior offer. (A169-A192, ¶¶101-148); *see, e.g.*, *Dole,* 2015 WL 5052214, at *2, *39-40 (Management "deprived the Committee of the ability to negotiate on a fully informed basis and potentially say no to the Merger."). C&J also ignores the trial court's acknowledgement that Comstock prevented Morgan Stanley and the Committee from receiving any

confidential information or updated forecasts. (Op. 52.) There was no oversight, and Comstock ran amok.[10]

[10] The Complaint alleges Paul Weiss's involvement in the Solicitation Process was limited to appearing at Committee meetings and the process was run by Comstock, C&J management, Vinson & Elkins, and Morgan Stanley. (A169-A192, ¶¶101-148.)

II. C&J STOCKHOLDERS WERE NOT FULLY INFORMED

Defendants incorrectly justify the trial court applying the business judgment rule based on the stockholder vote. (C&J Br. 23-34; MS Br. 16-17.) But Defendants have not met their burden to show that the stockholder vote was "fully informed."

A. THE TRIAL COURT MISAPPLIED *CORWIN*

C&J contends "[p]lacing the 'burden' on defendants" to apply the business judgment rule under *Corwin* "simply requires them to establish that a plaintiff's omission allegations are deficient." (C&J Br. 24.) Not so.

Corwin does not require a plaintiff to plead disclosure claims at all. As the Court of Chancery recently explained:

> Although a plaintiff generally bears the burden of proving a material deficiency when asserting a duty of disclosure claim, a defendant bears the burden of demonstrating that the stockholders were fully informed when relying on stockholder approval to cleanse a challenged transaction.

In re Comverge, Inc. S'holders Litig., C.A. No. 7368-VCMR at *6-7 (Del. Ch. Oct. 31, 2016) (citing *Corwin*, 101 A.3d at 999).

The trial court erred in holding that "plaintiff has failed to plead facts sufficient to demonstrate the C&J stockholder vote was not fully informed," and incorrectly placed the burden on Plaintiff to plead and demonstrate that

the vote was not fully informed. (Op. 2.) It was Defendants' burden to demonstrate the stockholder vote was fully informed. Defendants failed to do so.

B. THE FINAL PROXY FAILED TO FULLY DISCLOSE THE CERBERUS BID

The trial court erred in excusing the Final Proxy's omission of the terms of the Cerberus Bid, the fact that the bid was nominally more valuable than the market's valuation of the Nabors Deal, and the Committee's reasons for rejecting the bid. (Op. Br. 26-31.) Defendants' rationalizations for these errors fail.

C&J's contention that "Plaintiff did not plead these disclosure[s]" is false and misstates the law. It is Defendants' burden to prove that the stockholder vote was fully informed. (*Supra* II.A.)

And the Complaint alleges that "on its face, and even making [Morgan Stanley's] baseless assumption that Cerberus's proposal offered no synergies, the [Cerberus Bid] was worth more than the [Nabors Deal]" (A138-A139,

¶17)[12] and these material facts were undisclosed, precluding a *Corwin* defense. *In re Comverge, Inc.*, C.A. No. 7368-VCMR, at *6-7.

Relying on cases concerning the omission of ***pre-deal announcement*** proposals, C&J contends there was no duty to disclose the Cerberus Bid. (C&J Br. at 29-31.) But C&J must demonstrate the terms of the bid were not needed to fully inform stockholders, and they have not. (*Supra* II.A.) The bid emerged after the Board handed the decision to C&J stockholders. The importance of disclosing competing proposals is magnified when the Board has presented its recommended merger to investors for approval.

C&J's contention that Plaintiff's review of publicly-filed proxies failed to identify instances when fiduciaries buried competing bids is nonsensical. (C&J Br. 30 n.5.) By definition, nobody can identify successfully buried bids. Additionally, C&J's "it is ok because other people do it" defense, if accepted, would undermine the rule of law. *See In re VAALCO Energy, Inc. S'holder Litig.*, C.A. No. 11775-VCL (Del. Ch. Dec. 21, 2015), Hr. Tr. at 67:15-19

[12] Footnote 4 of C&J's brief argues the Cerberus Bid was irrelevant to the Injunction appeal argument. But this ignores this Court's questioning addressed, among other things, the passive market check and Merger Agreement's "fiduciary out" provision. (A115-A121 [48:9-54:2].) This issue was raised below. (B688-B689.)

("Just as 'all the other kids are doing it' wasn't a good argument for your mother . . . [it] isn't a good argument [to defend a breach of fiduciary duty].").

Defendants also ignore that, upon providing partial disclosure of the Cerberus Bid, they had a duty to fairly and accurately characterize it. *Arnold v. Soc'y For Savs. Bancorp, Inc.,* 650 A.2d 1270, 1281 (Del. 1994). C&J's own authority, *In re MONY Grp. Inc. S'holder Litig.*, agrees a proxy statement is misleading when it withholds the value of a contingent bid, and partial disclosures could lead a reasonable stockholder to conclude "there were no 'genuine' bids for actual dollar amounts." 852 A.2d 9, 30 (Del. Ch. 2004).[2] C&J's passing reference to the Cerberus Bid deceived investors into assuming it was not a genuine alternative.[3] C&J's stockholders were not fully informed.

---

[2] C&J misrepresents the case law, as the *MONY Group* court accepted *Arnold*, and found there was no disclosure violation because a mere interest in talking with management *if* the agreed upon deal failed, with no cash or deal terms, did not require more disclosure. 852 A.2d at 18. The Cerberus Bid was a genuine, competing bid with a monetary offer.

[3] C&J suggests the Cerberus Bid need not be disclosed because it was "contingent on certain 'conditions,' 'assumptions,' and 'due diligence,' which Cerberus had not even begun." (C&J Br. 30.) The Cerberus Bid was a genuine, monetary offer, subject to standard conditions.

C&J next argues it disclosed the reasons for the rejection of the Cerberus Bid. (C&J Br. 31.) C&J is wrong. The Final Proxy reports the Committee's conclusion (that the intervening bid was not likely to lead to a Superior Proposal) without fully informing stockholders of the Committee's reasoning. The law does not accept this "trust us" view of disclosure. Particularly in light of the Board's constrained interpretation of the "fiduciary out" and unbalanced comparison of the Cerberus Bid against the Nabors Deal, Defendants were required to provide full and accurate characterization of the Board's reasoning. *Arnold*, 650 A.2d at 1281.

C&J also seeks inferences that Morgan Stanley did not view the bid as more valuable than the Nabors Deal. (C&J Br. 31-32.) The Complaint alleges that "on its face, and even making [Morgan Stanley's] baseless assumption that Cerberus's proposal offered no synergies, the [Cerberus Bid] was worth more than the [Nabors Deal]." (A138-A139, ¶17.) Bishop testified the Cerberus Bid was valued higher than the post-Nabors announcement market price of C&J. (B188 [108:3-9].)[4] C&J's assertion that

[4] Footnote 7 of C&J's brief ignores that with a full and accurate Final Proxy, C&J stockholders could have rejected the Nabors Deal in favor of a standalone strategy or to allow Cerberus to re-emerge and pursue a deal. (C&J Br. 32 n.7.)

the Nabors Deal provided a 28% premium to the pre-deal C&J stock price and, thus, it was reasonable to require a 30% premium from Cerberus, is nonsensical. (C&J Br. 40 n.10.) Putting aside that neither the Injunction nor Merger Agreement define a Superior Proposal to require a 30% premium, the value of the Nabors Deal was reflected in C&J's stock price when Cerberus made the Bid. (A230; A998.)[5] Moreover, the Complaint alleges Morgan Stanley understated the Cerberus Bid's value by ignoring known synergies, while inflating the Nabors Deal's value by including synergies and excluding implementation costs. (A180-A187, ¶¶126-139.)

C&J did not demonstrate its stockholders were fully informed about the Cerberus Bid and the trial court erred in applying the business judgment rule.

C. THE FINAL PROXY FAILED TO DISCLOSE THE CONDUCT OF THE SOLICITATION PROCESS

The trial court erroneously excused the Final Proxy's omissions about the Solicitation Process. (Op. Br. 32-34.) Defendants' efforts to justify this error fail.

First, C&J reiterates the trial court's improper characterization of allegations about Morgan Stanley's distortion of the Cerberus Bid as mere

[5] Indeed, the Nabors Deal was a negative premium deal. (A186, ¶136.)

"quibbles." (C&J Br. 32-33.) But the Complaint adequately alleges Morgan Stanley and Comstock skewed the Solicitation Process in favor of the Nabors Deal. (A169-A192, ¶¶101-148.) Delaware law requires full disclosure when conflicted fiduciaries and advisors put their thumb on the scale of the sales process, as Comstock and Morgan Stanley did here. *See, e.g.*, *Dole*, 2015 WL 5052214, at *29 ("an important element of an effective special committee is that it be fully informed in making its determination [and fiduciaries must] disclose fully all material facts and circumstances surrounding the transaction."); *In re Rural Metro Corp.*, 88 A.3d 54, 104 (Del. Ch. 2014); *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011).

Second, C&J argues, for the first time, there was no duty to disclose Morgan Stanley's analysis because there was no fairness opinion and no partial disclosure of Morgan Stanley's analysis. (C&J Br. 34.) Again, C&J ignores it is Defendants' burden to demonstrate stockholders were fully informed. Regardless, Defendants were required to fully disclose the bid's terms and Morgan Stanley's analysis when they partially disclosed "the Special Committee's determination that [the Cerberus Bid] was not reasonably likely to lead to a superior proposal." (A437); *Arnold*, 650 A.2d at 1281. Defendants were also required to disclose that the Board's conclusion

to ignore Cerberus rested on Morgan Stanley's contrived 30% premium-to-market definition of "superior proposal," inconsistent with the Merger Agreement's "fiduciary out" provision, and the different treatment of synergies among the competing bids (Op. Br. 32-34); *Dole*, 2015 WL 5052214, at *29 (Fiduciaries must "disclose fully all the material facts and circumstances surrounding the transaction.").

C&J stockholders were not fully informed about the Solicitation Process. The Opinion must be reversed.

D. THE FINAL PROXY'S USE OF THE $445 MILLION NCPS 2015 EBITDA ESTIMATE WAS A MATERIAL MISREPRESENTATION

The trial court erred because the Final Proxy omitted that the $445 million 2015 NCPS EBITDA estimate was: (i) inflated from the outset and (ii) knowingly inaccurate at the time of the Final Proxy. (Op. Br. 34-36.) Defendants' counterarguments are wrong.

First, C&J's contention that that Final Proxy merely disclosed the projections "'that [were] considered by the [Board] and also provided to C&J's financial advisors'" misses the point. (C&J Br. 25.) Fraud on the Board in June 2014 (A164, ¶¶90-91; A166, ¶95) is no license for perpetuating the same fraud on stockholders in March 2015, particularly when the

injunction process informed the Board about the inaccurate EBITDA data. *See In re Rural Metro Corp.*, 88 A.3d at 104.[6]

Second, C&J improperly argues that "Plaintiff's allegations concerning the EBITDA estimate are predicated on snippets taken from emails … [and] Plaintiff does not want disclosure of the full context of these emails." (C&J Br. 26-27.) Plaintiff would like nothing more than **full disclosure of the record**, including emails concerning the EBITDA estimate. Even if the trial court predicted at this stage that it would make "findings" from the emails (or from C&J's litigation-driven affidavits), Plaintiff is entitled to test its plausible and credible view of the emails in discovery. *See, e.g., In re Sauer-Danfoss, Inc. S'holder Litig.*, 2016 WL 297812, at *3 (Del. Ch. Jan. 22, 2016).

Third, C&J admits that as of the Final Proxy, the Board knew that Nabors told KPMG that its estimated 2015 EBITDA was $376 million, not

[6] C&J's attempt to distinguish *RBC* (C&J Br. 3 n.3) fails. Like *RBC*, the $445 million EBITDA projection was "provided to C&J's financial advisors for use in connection with their respective financial analyses and opinions" and, in turn, was relied on by the Board in approving the Nabors Deal. (A458.) That EBITDA projection was false, as demonstrated by Nabors informing KPMG it estimated 2015 EBITDA at $376 million. (A158-A160, ¶78; A162, ¶85; A190, ¶146.) C&J cannot simply deny the allegations of the Complaint.

the $445 million repeated to investors. C&J argues the Complaint does not specifically allege what the Board learned through the litigation. (C&J Br. 27-28.) But it is ***C&J's burden*** to demonstrate the disclosure was full and accurate. *In re Comverge, Inc.*, C.A. No. 7368-VCMR, at *6-7; (*infra* II.A.). The Final Proxy contained the $445 million EBITDA estimate that the Board knew was inaccurate. (A159-A166, ¶¶78, 85, 90-91 & 95; A190, ¶146.)[7]

The stockholder vote was not fully informed about the $445 million 2015 NCPS EBITDA estimate. The trial court erred in applying the business judgment rule.

E. THE PI REVERSAL DOES NOT CLEANSE MISCONDUCT

Defendants assert the trial court properly found that the PI Reversal excuses Defendants' nondisclosures. (MS Br. 21-23; C&J Br. 18.) But it is Defendants' burden to demonstrate that stockholders were fully informed about the Solicitation Process and Cerberus Bid. (*Supra* II.A.)

Regardless, the duty to disclose the Cerberus Bid to investors is more acute if the no-shop provision's reinstatement prevented the Board from

[7] *Pfeffer v. Redstone*, 965 A.2d 676, 688 (Del. 2009), cited by C&J, supports Plaintiff's position. Information concerning the $445 million EBITDA estimate was "reasonably available" to the directors during the Injunction phase of this litigation. *Id.*; *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992).

engaging with Cerberus. If the Board could not help stockholders maximize value, stockholders needed information to protect themselves. The PI Reversal's reinstatement of the no-shop clause cannot excuse C&J's burden to establish the stockholder vote was fully informed. (Op. Br. 36-37.)

III. PLAINTIFF DID NOT WAIVE ITS AIDING AND ABETTING CLAIMS

Morgan Stanley and Nabors assert that Plaintiff waived any appeal of the dismissal of aiding and abetting claims. (MS Br. 3, 18; NB Br. 3, 7-8.) The trial court summarily dismissed Plaintiff's aiding and abetting claims (Op. 55-56 ("because each of plaintiff's fiduciary duty claims fails to state a claim for relief, plaintiff's claims for aiding and abetting a breach of fiduciary duty also must be dismissed.")). The trial court erred in dismissing the underlying breach of fiduciary duty claim. (Op. Br. 18-25, 26-42.) With no ruling concerning the claims against Nabors and Morgan Stanley beyond the underlying breach of duty dismissal, there is nothing unique to decide. *Sanchez*, 124 A.3d at 1023-24 (reversing motion to dismiss and remanding to lower court to adjudicate the aiding and abetting claims).

While the Court could reverse and remand to the trial court for further proceedings on the aiding and abetting claims, the Complaint adequately alleges that Nabors and Morgan Stanley knowingly participated in the underlying fiduciary breaches. (A136-A203, ¶¶13-14, 18-20, 46-71, 77-91, 111-115, 126-139, 170-175, & 180-183; A204, ¶¶D-E; A982; A997-A1003; A1014-A1016; A1040-A1054.)

IV. THE TRIAL COURT ERRED IN AWARDING C&J DAMAGES AGAINST THE INJUNCTION BOND

C&J contends the standard of review concerning the Injunction Bond is abuse of discretion because Plaintiff is seeking "a review of factual findings." (C&J Br. 35.) C&J is wrong. Plaintiff does not challenge the trial court's factual finding that the Solicitation Process cost $542,087.89. Plaintiff contends that the trial court incorrectly applied the law, requiring *de novo* review. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).[8]

A. C&J ACTED IN BAD FAITH AND FAILED TO COMPLY WITH THE INJUNCTION

C&J does not dispute that Delaware law and the Injunction required: (i) C&J to conduct the Solicitation Process in good faith; (ii) the Committee to assess whether the Cerberus Bid was "more favorable to stockholders of [C&J] ***from a financial point of view***" (Op. Br. 15); and (iii) Comstock and conflicted management to stay out of the Solicitation Process. Rather, using selected snippets from emails and deposition transcripts, C&J argues it

[8] C&J's reliance on *Guzzetta v. Serv. Corp. of Westover Hills*, 7 A.3d 467 (Del. 2010) (C&J Br. 35) supports *de novo* review. There, plaintiffs merely challenged the *amount* of the bond, which is within the Court of Chancery's discretion, while here, Plaintiff makes legal arguments challenging Defendants' right to collect an undisputed amount. *Guzzetta*, 7 A.3d at 471.

complied with the Injunction in good faith.[9] But even the limited discovery afforded in connection with the Bond demonstrates contested facts concerning Defendants' taint of the Solicitation Process, C&J's cherry-picking ignores facts that demonstrate it did not comply with the Injunction and acted in bad faith including, *inter alia*:

- Comstock tainting the sale process. (A221-A222.)

- Morgan Stanley was conflicted. (A131-A174, ¶¶1, 14, 111-115, & 114; B168 [27:5-29:17]; B173 [46:14-48:15]; B196 [138:14-139:15].)

- The Committee "did not authorize [Comstock or McMullen] to negotiate the final terms" with Morgan Stanley or to "promise Morgan Stanley future work," and was not told that Comstock promised Bishop: "If y'all do this, it is a solid in with the Company." (B113-B134 [43:25-46:24].)

- Comstock, not the Committee, controlled the Solicitation Process. (C&J Br. 39; A215; A224-A229; A247-248; B138 [64:15-25], B117 [63:3-66:8]; B138 [64:15-25]; B174 [52:14-53:6]; B184-B185 [93:25-94:21].)

- Comstock berated Bishop for presenting the Cerberus Bid to C&J management, asking "How can you say that ***you're still supportive of me*** if what you're actually doing is comparing these small companies that these sponsors have grown together

[9] Only limited discovery was afforded in connection with the Bond (AR2 – AR3). Even that limited discovery uncovered serious flaws with the process. Plaintiff is confident that full discovery will uncover additional evidence of fiduciary breaches and aiding and abetting thereof.

with this large company that I have put together?" (B196 [139:7-15].) Bishop wrote Comstock the next day reassuring him that he was "***100% supportive of [Comstock] through this endeavor . . . and our only objective is that we help you continue that success***. (B195 [136:7-137:19].)

- Morgan Stanley skewed its analysis in Comstock's favor. Morgan Stanley's presentation told the Committee there would be no synergies from the Cerberus Bid, even though Morgan Stanley estimated immediately incremental EBITDA of $20 million. (B193 [128:5-129:21]; B205 [174:10-175:16]; B208 [187:4-19]; A187, ¶139; B211 [200:5-15]; A185, ¶135; A235-A236.)[10] Delaware does not accept such manipulation. *Rural Metro*, 88 A.3d at 104-105; *Del Monte*, 25 A.3d at 832.

- C&J never compared whether from a financial point of view, the Cerberus Bid was more favorable to C&J stockholders than the Nabors Deal, as required by the Injunction. (A213-A214, A232-A234; B215 [217:7-16]; B215-B216 [217:18-218:13]; *Cf.* B236 with A105-A107.)[11]

The Order should be reversed because: (i) C&J acted in bad faith (*Plaintation Park Ass'n, Inc. v. George*, 2007 WL 316391, at *3 (Del. Ch.

[10] Contrary to C&J's assertion, Morgan Stanley never did an "apples-to-apples" comparison of the C&J pro forma share price of the Cerberus Bid with the Nabors Deal that excluded synergies. (*Cf.* B259 n.2; B250.)

[11] C&J's argument that the Nabors Deal provided a 28% premium to the then-current C&J stock price and, in turn, it was reasonable to seek a 30% premium is unpersuasive. (C&J Br. 40 n.10.) The Injunction and Merger Agreement do not instruct that a competing bid has to present a 30% premium to be potentially superior. (A105-A107, A503-A506.) And the value of the Nabors Deal was already reflected in C&J's stock price. Finally, C&J fails to account for Morgan Stanley deflating its value of the Cerberus Bid, while inflating its value of the Nabors Deal. (A234-A235; A998-A1002.)

Jan. 25, 2007) ("equity will not reward inequitable conduct"); and (ii) failed to comply with the Injunction. *Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 560 (2d Cir. 2011).

B. C&J FAILED TO MITIGATE DAMAGES

C&J's main challenge to Plaintiff's failure to mitigate damages argument is that C&J purportedly acted "reasonably" in asking the trial court to lift the stay so it could comply with the Injunction while pursuing an expedited appeal. (Op. Br. 41-44.) But the record shows that C&J did not act reasonably; it manipulated the system. C&J knew: (1) there was no possibility the deal would close by year end because it would be postponed by the SEC regardless of the Injunction (A171) and (2) there was no real risk Nabors would walk away from the deal. Comstock knew Nabors would extend the year-end provision because: (1) Nabors' CEO indicated he would do so "if/when absolutely needed" (B127 [20:22-21:4]) and (2) Nabors had pronounced its commitment to the deal to its shareholders and employees (B358.) Despite this information, C&J voluntarily waived the Stay and pursued the expedited appeal on the pretense that resolution was necessary before year-end and then failed to inform this Court that the Solicitation

Process elicited a competing bid. Far from being reasonable, C&J acted in bad faith by gaming the system, failing to mitigate its damages.[12]

Dated: December 22, 2016

Of Counsel:

Mark Lebovitch
Jeroen van Kwawegen
Christopher J. Orrico
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
44th Floor
New York, NY 10020
Tel: 212.554.1400

/s/ *Mary S. Thomas*
Stuart M. Grant (Del. # 2526)
Mary S. Thomas (Del. # 5072)
GRANT & EISENHOFER P.A.
123 Justison Street
Wilmington, DE 19801
Tel: 302.622.7000

Counsel for Plaintiff Below-Appellant

[12] C&J also argues that Plaintiff somehow lost its ability to challenge its good-faith performance under the Bond because Plaintiff knew the trial court would lift the stay when it posted the bond. (Op. Br. 45.) But Plaintiff's actions are irrelevant to the question of whether C&J mitigated its damages.

CERTIFICATE OF SERVICE

I, Mary S. Thomas, hereby certify that on December 22, 2016, I caused a copy of the *Appellant's Reply Brief* to be filed and served to all counsel below via File and Serve*Xpress*:

Stephen C. Norman
Michael A. Pittenger
Jaclyn C. Levy
POTTER ANDERSON & CORROON LLP
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899

William M. Lafferty
Susan W. Waesco
Richard Li
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899–1347

Ashley R. Altschuler
John L. Reed
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801

Dated: December 22, 2016

/s/ *Mary S. Thomas*
Mary S. Thomas (Del. #5072)